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THE

AMERICAN LAW REGISTER.

FEBRUARY, 1864.

CONFLICT OF LAWS AFFECTING MARRIAGE AND DIVORCE. THE DISTINCTION BETWEEN THE ENGLISH AND SCOTCH LAW. THE VALIDITY AND EFFECT OF FOREIGN DIVORCES.

1. In Roman Catholic countries divorce is left chiefly with the church.
 2. Now conceded that an English marriage may be dissolved by foreign decree.
 3. *Warrender vs. Warrender* embraces principles of universal application.
 4. Marriage is a contract dependent upon the existing municipal laws.
 5. But this principle is denied, when it is attempted to govern the contract by the law of its creation.
 6. It is virtually adopted in the case of *Warrender vs. Warrender*, but not in terms.
 7. Distinction between marriage contracts, and those of a pecuniary character.
 8. The English courts uphold marriages celebrated abroad between English residents, even when done to evade the authority of the English law.
 9. The American courts do this, even where had in fraud of local law.
 10. The subject-matter of a suit for divorce is confined to the place of the domicile.
 11. Divorces can only be granted for violations of the law of the forum.
 12. Chief Justice GIBSON's exposition of the subject in *Dorsey vs. Dorsey*.
 13. Some of the American states allow divorces for causes arising out of the state.
 14. The public opinion is very tender towards parties suing for divorce.
 15. The effect of *ex parte* divorces is that which chiefly concerns public justice.
 16. We make no question here in regard to the propriety of increasing the facilities for divorce.
 17. All parties agree in maintaining the purity of judicial administration.
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18. A sovereign state may grant the privilege to marry again.
19. The great question is as to the effect of such license elsewhere.
 - (1.) It will not be claimed that decrees of divorce are decrees *in rem*.
 - (2.) The jurisdiction cannot be based upon the consent of the parties. The court must have jurisdiction of the subject-matter and of both the parties.
 - (3.) The subject-matter of a divorce is strictly local, as much as that of crime.
 - (4.) It cannot be enforced except as a breach of an existing law of the forum.
 - (5.) It is as much local as the law of wills, or descents, and pertains to the courts of the domicil.
20. Divorces, if tried abroad, should be tried by the law of the domicil of the parties.
21. It involves not only wrong, but inconsistency, to try such cases by any other law.
22. The Act of Congress, and the Constitution, only apply where the courts have full jurisdiction.
23. Notice of the suit, served out of the jurisdiction, cannot confer jurisdiction.
24. The comments of SEWALL, J., in *Barber vs. Root*.
25. The severity of Mr. Justice SEWALL seems neither unjust nor unreasonable.
26. The same view was early adopted in New York: *Borden vs. Fitch*.
27. And reaffirmed in *Bradshaw vs. Heath*, and in many recent cases in that state.
28. The same was maintained in Kentucky: ROBERTSON, Chief Justice.
29. *Ex parte* divorces have been defended in some few states.
30. That is done in *Harding vs. Alden*, 9 Greenleaf Rep. 140.
31. The same views are elaborately and learnedly defended in *Ditson vs. Ditson*, 4 R. I. R. 89.
32. The suggestion that Chief Justice SHAW is under mistake, results from misapprehension.
33. There is no doubt of the right of a state to allow its inhabitants to marry again, and to qualify them by decree of divorce.
34. But such a decree is a license to marry another wife, not to put off the former one.
35. This allows a person to have different wives or husbands in different states.
36. It means this or it means nothing.
37. The comments of Chief Justice RUFFIN.
38. The law of domicil as between husband and wife.

1. As the municipal law does not assume to interfere with the obligations, or violations, of the duty resulting from marriage, in many of the countries where the Roman Catholic religion predominates, but leaves that to be administered by the judicial functionaries of the church, *pro salute animæ*, we do not derive much light upon the subject from the writings of the continental jurists of Europe. Story's Conf. Laws, § 212. And the field embraced by this

topic, in the law of Great Britain and America, is sufficiently extended to occupy all the space which we could here devote to it. In France divorces are granted by the civil magistrate for adultery and some other causes. Code Napoleon, B. I. tit. V., ch. VII.

2. The question was long debated, whether an English marriage, which is there held indissoluble except by Act of Parliament, can be dissolved by the decree of any foreign court. It seems to be still regarded as an unsettled question in England. But it having been determined by the House of Lords, in *Warrender vs. Warrender*, 2 Cl. & Fin. 488, s. c. 9 Bligh 127, that by the law of Scotland, such a decree is valid, and that the Scotch courts have jurisdiction of both parties, by virtue of the husband having his domicile there, and having cited the wife into the courts of that country, and her having made appearance, to contest the case upon all points, embracing the jurisdiction as well as the merits; this having been settled by the court of last resort in England, it has been inferred that the same rule would be applied to the decree when brought in question, directly, in the English courts.

3. We can entertain no question that the principle enunciated in the case of *Warrender vs. Warrender*, and maintained with so much learning and ability by the elaborate opinions of Lords BROUGHAM and LYNDHURST, is of universal application. Marriage may be regarded, in some sense, as a contract; but it is something more, and much higher, and more sacred. If not a sacrament, in the strict sense of the canons of the Romish Church, it is the creation of a new relation of a very important and fundamental character, having its influence and control extended to all the interests and relations of social life. We do not propose to discuss the propriety of the rule of law by which it is held indissoluble. We think some good reasons may be urged in favor of even that extreme view. But we shall not stop to discuss that point. But waiving all question in regard to the character and qualities of the marriage relation by the laws of the country where it is solemnized, and conceding that marriage may have been properly solemnized, in conformity to the laws of a country, where it is held absolutely indissoluble, that does not appear to us to reach the point in

debate, or to embrace the most serious difficulty involved in the subject.

4. Marriage is not a contract which receives its entire character, force, and construction, from the laws operating upon the parties at the time of its celebration. It is a continuing contract and one whose duties and obligations, as well as the subsisting rights resulting from it, are as much ambulatory almost as a will. It is not only executory, but continuing, and subject to modification from time to time, by the general legislation of the states, as to its rights and duties, and therefore not within the constitutional provision against laws impairing the obligation of contracts: MARSHALL, C. J., in *Dart. Coll. vs. Woodward*, 4 Wheat. 528. We do not desire to state offensive, and surely not painful, illustrations. But we do not comprehend why it may not be in the power of the municipal lawgiver to provide at any time, that a man may take more than one wife, or even that a wife may have more than one husband at the same time. And by parity of reason it must be in the power of the legislature of an independent sovereign state, unless there is some constitutional restriction upon the subject, to wholly release the parties from the duties, rights, and disabilities primarily resulting from the marriage relation, so far as the future conduct of the parties is concerned. The legislature of every sovereign state, unless restrained by some constitutional limitation, possesses the same omnipotence as the British Parliament, and may annul the marriage relation at pleasure, and by consequence they may modify its resulting rights and duties to any extent. The contract creates no vested rights, as to the future conduct of the parties, which it is not in the power of state legislatures to annul even in the United States, where the national constitution prohibits the states from passing any law impairing the obligation of contracts. The relation of marriage is one of those things, so essentially affecting society, and the civil and economical relations of social existence, that it must of necessity be under constant and perpetual legislative control. This is distinctly stated, as the generally received doctrine upon the subject, in Story's *Confl. Laws*, § 222. Any other view would induce the greatest confusion. If every

contract of marriage, as to its resulting and continuing duties and rights, were to remain for ever subject to the very law of the time and the place of its creation, then the existing married persons in any one state or country would be subject to as many different laws, as the legislature should happen to have created during the joint lives of all the married couples in the state at any one time, which would involve too glaring an absurdity to be understandingly entertained by any one. Married life, instead of creating the same duties and rights in all cases, would create rights and duties as various as any other species of contract. Ordinary contracts depend upon the will of the parties, both in their inception and continuance; and equally in regard to their termination. And hence, there is an infinite variety in ordinary contracts upon the same subject. But marriage is so inherent and interwoven with the very framework of social life, that it must of necessity possess the quality of perfect uniformity. The rights and duties, therefore, of each married couple in a state, must accommodate themselves to the existing law of the moment, without reference to the law which existed at the time of the creation of the relation.

5. But this is precisely the principle which is denied when it is asserted that marriage contracted and celebrated in a state, and at a time when it is indissoluble, for ever retains that quality, the same as any other contract, and that it is therefore impossible for the courts of any other state to dissolve it in conformity to the law of such state. This implies that however the law of a state may change, or into whatever other jurisdiction the parties may remove, their rights and duties, as to the married relation, have become irrevocably and unalterably fixed, by the law of the contract, at the time of its inception. It is this fallacy, as we regard it, of the early English cases upon this subject, such as *Lolley's Case*, 1 Russ. & Ry. Cas. 237; *Tovey vs. Lindsay*, 1 Dow. Rep. 124; *McCarthy vs. DeCaix*, 3 Hagg. Eccl. Rep. 642, and note, which the case of *Warrender vs. Warrender*, *supra*, without exactly professing to do so, has nevertheless, effectually dispelled.

6. It is true that the last case professes to steer clear of the very question, so long at issue between the English and Scotch

courts, in regard to the validity of the judgments of the courts of the latter country, decreeing the dissolution of an English marriage between British subjects, domiciled in England at the time of the celebration of the contract, since the petitioner in the case of *Warrender vs. Warrender* was always a domiciled Scotchman, the respondent being an English woman, domiciled in England. But no stress is laid upon the distinction between an English marriage, when one of the parties is domiciled in Scotland at the time, and that the husband; and one, where both the parties are domiciled in England; and, in the nature of things, there can be no difference in principle between the two cases, as to the right of the courts in Scotland to decree the dissolution of the marriage.

7. It is unquestionably true that in regard to an ordinary contract, between party and party, where nothing but pecuniary interest and obligation is concerned, the rights of the parties become irrevocably fixed by the force of the existing law of the time and place of its celebration. And this rule, of ordinary money or property contracts, will often be extended to the pecuniary rights accruing during the married relation. Thus in *Anstruther vs. Adair*, 2 Myl. & Keen 513, it was held that when the parties to a marriage contract, being both domiciled in Scotland, entered into an ante-nuptial agreement, the effect of which, by the Scottish law, was to give the husband the right to receive whatever property accrued to the wife during coverture, it should have the same force and effect in an English court as to all property accruing to the wife during coverture, within the jurisdiction of such court. But this rule could not be extended to the ordinary rights and duties growing out of the married relation. It could not be tolerated, that the rights and duties of the marriage relation in a state should be referred to the laws of the different countries, where the parties entered into the relation. That would be to surrender the point most vital to social life and to social progress and refinement, to the law, not of one foreign state, and that one of its own selection, but to the laws of as many different foreign states as the inhabitants of the country might happen to come from. Naturalization and citizenship are ques-

tions exclusively under the control of the municipal law, and which no state will consent to surrender to any other state. That would involve dependence and want of sovereignty in a matter most vital to civil and national independence. But the control of the rights, obligations, and duties of the marriage relation, embraces interests more vital, if possible, to the continued and permanent prosperity of a nation than even those affecting citizenship. It is scarcely possible to over-estimate the importance of the married relation to social comfort, purity, and prosperity.

8. But upon the question of the continuing validity, force, construction, duty, and obligation of the marriage contract, the original domicil of the parties is not essential. For even the English courts have felt compelled to recognise the validity of Scotch marriages between parties domiciled in England and constantly residing there, if they even went into the foreign jurisdiction for the mere purpose of avoiding the laws of their own country, and thus acted in fraud of the law. *Steele vs. Braddell*, 1 Milw. Consist. R. 1; 10 Burge on Col. and For. Laws 192, 193; Story's Conf. Laws, § 124, and note. It is true that by what has very much the appearance of a forced construction, it has been claimed by English writers, that these Gretna Green marriages, between parties domiciled in England, are not in exact conflict with the terms of the Marriage Act in England; but it is matter of notoriety the world over, that such marriages are entered into in that way, in fraud of the English law, and with the express purpose of escaping from its requirements. So that while the English writers already referred to, and the English judges, (Lord MANSFIELD in *Robinson vs. Bland*, 2 Burrow 1077), declare the rule of law to be, that a marriage between British subjects, domiciled in England, celebrated in a foreign country, in fraud of the English law, and with a view to evade its provisions, is void, special care has been taken not to bring any but the most flagrant cases within the rule thus laid down.

9. On the other hand, the American courts have not attempted to uphold this rule of the English courts, and of the civil law writers upon the continent of Europe (*Huberus de Conflictu Legum*),

but have boldly maintained the doctrine that the marriage of persons competent to contract the relation and domiciled in one state, while the marriage is celebrated in another, in express disregard and with the view to escape from the restrictions of the law of the state of their domicil, is entirely valid. *Medway vs. Needham*, 16 Mass. Rep. 157; *Putnam vs. Putnam*, 8 Pick. 433. We apprehend this rule may ultimately require some qualification, as if for instance, the marriage should take place while one of the parties had a wife or husband living in a state where polygamy is allowed. Other qualifications may also be supposed, and will, in time, occur.

10. But the most important question, arising out of these conflicting views, is the extent to which a foreign court may have power to dissolve the marriage relation, for any cause not arising within the jurisdiction of the court, or while the parties were domiciled within that jurisdiction. As a principle of general law, it will be found true, we believe, that the jurisdiction over causes of divorce depends, primarily at least, upon the domicil of the parties at the time such alleged cause accrued. It is not indispensable that the act should, in all cases, have accrued within the local jurisdiction; but if it occur elsewhere, while the parties, or one of them, is temporarily abroad, it will be referred to the place of the fixed domicil of the parties, and will there have the same effect as if committed within that jurisdiction. This was expressly so ruled in *Dorsey vs. Dorsey*, 7 Watts 349, and in *Brett vs. Brett*, 5 Met. Rep. 233, and in numerous other cases. In the case of *Brett vs. Brett*, this is placed upon the special provisions of the Massachusetts statute. But it is one of universal law, so far as we know, in all civilized and Christian countries, with some exceptions which we shall hereafter notice. It is matter of internal police, belonging exclusively to the courts of the state where such violations of the marriage relation occur, or where the parties are domiciled at the time. It is not precisely the same with the criminal law of a state, but it bears a very close analogy to that. For although offences against the marriage relation affect the rights of persons, it is not chiefly in

that light that they are viewed by wise and prudent legislators. The offences are more important to the well-being of the state than to the comfort of the particular parties interested. Hence causes of divorce are not transitory in their nature, like breaches of contract and torts. We are not aware that any state ever attempted to try a cause for divorce according to the law of another state, and to render such a judgment as the foreign court should have rendered upon the same facts. The jurisdiction to try causes for divorce is confessedly local. They cannot in any case be tried except by the law of the forum where tried, and the facts must constitute a good cause of divorce by the law of the forum, or no decree can be rendered. No court ever attempted to maintain the contrary. Story's Conf. L. §§ 205, 206-213.

11. The acts, then, which are relied upon for the *cause* of divorce, must have accrued while the parties were subject to the law of the forum where the divorce is granted. It would involve the most glaring absurdity to hold that while the parties were domiciled in one state, where desertion or cruelty are no causes of divorce *a vinculo*, that such facts, accruing while the parties were domiciled there, might be made the foundation of a decree of divorce in another jurisdiction, where such acts are held good ground for dissolving the married relation. This would be literally, in the language of Lord ELLENBOROUGH in *Buchanan vs. Rucker*, 9 East 192, to allow one jurisdiction to pass laws "to bind the rights of the whole world." His lordship's query would seem pertinent in such a case, "would the world submit to such an assumed jurisdiction." We are not aware that any court, or country, have presumed to claim this. We believe it is conceded that divorces can only be granted in conformity to a law of the state where, and which law was in force at the time, they are granted.

12. This being conceded, it would seem to follow as a necessary corollary, that divorces could only be granted for causes accruing within the jurisdiction, or while the parties were amenable to the laws of the jurisdiction where granted. We do not understand that any European court has assumed to go beyond this, in theory,

although it is intimated that the Scottish courts, in practice, have sometimes granted divorces for acts accruing before either of the parties had any domicile within the jurisdiction. Story's Conf. L., § 205; GIBSON, C. J., in *Dorsey vs. Dorsey*, 7 Watts 349. The language of the learned judge is certainly very just and forcible in regard to this alleged practice of the Scottish courts. "Moreover, it is not perceived how the actual presence of both of the parties could confer jurisdiction of a cause of divorce which was not in its inception subject to the law of the forum. It seems to me the fallacy in the reasoning of the Scottish judges—plausible though it be—consists of their assumption that divorce is a penalty everywhere annexed to the breach of the marriage contract, which, like a civil cause of action attendant on the person, may be enforced everywhere; thus forgetting that whether it be a penalty at all, depends not on the Scottish law as an interpreter or avenger, but on the law of the domicile, or else on the *lex loci contractus*, which exclusively furnishes the original conditions." But it is evident the Scottish law writers do not acquiesce in these assumptions of the learned judge being fully established in the law of Scotland. Ferguson on Marriage and Divorce 18, 19; Story's Conf. L., § 206. And whether so established there or not, it is clear no such rule of law, as applicable to the question of divorce, is maintainable, upon any fair and just view of the subject, and the rules of law applicable to it.

13. But whether recognised in Scotland or not, it is certain that many of the American states have attempted to act upon such a rule, or something very analogous to it. There are now a considerable number of the American states, where statutes exist, giving the courts, in express terms, jurisdiction to grant divorce, for causes accruing out of the state, and while the parties were both domiciled in another state. We are not aware that any state has gone the length of allowing its courts to grant divorces, for causes occurring out of the state, where such causes would not afford just ground for dissolving the married relation, if they had occurred within the state. Such an act of legislation would present too much the appearance of giving a price, for the accumulation of suits for divorce from all the regions of the earth, to be

adopted by any state, not wholly insensible to all just sense of delicacy and pride. But this very qualification shows that the law of the place of domicil, at the time the cause of divorce accrues, must govern. These statutes have commonly been passed, through the solicitation of parties already domiciled within the state, and not coming within the existing laws of the state; and feeling desirous of trying a new experiment in the matrimonial scheme, have thus by their importunity induced an inexperienced legislature to yield to their wishes, without reflecting that the same statutes, while they afforded relief to an unhappy, or vicious citizen, already domiciled within the jurisdiction, would very soon have the effect of drawing others there, for the express purpose of obtaining relief from uncomfortable obligations, which could not be released, by the law to which the person was legitimately amenable.

14. It has thus happened that the local laws of the several states have been constantly suffering declension, and deterioration in this respect, until the divorces granted in some of the states have become a matter of wonder throughout the civilized world. And we have reason to know that in one of the states, after the law had been thoroughly purged, through the influence of Christian men in the legislature, of every such offensive provision upon the statute book, it was found impossible to maintain this state of purity for a longer period than two years, on account of the tenderness of legislators towards what was called misfortune. Interested parties procured the passage of statutes, giving the courts jurisdiction of causes of divorce accruing without the state, upon the ground that the injured party, after the offence, had come to reside within the state, and been permanently domiciled there, at first for the term of five years, which term was constantly abbreviated by subsequent legislatures, upon the importunity of injured parties who had sought the protection of so humane a forum, and who had become tired of waiting the slow lapse of so long a term as five years.

15. It is in regard to this species of legislation, and the *ex parte* decrees granted under such laws, that the public is chiefly

concerned. For if such decrees are to be recognised as of any validity within the jurisdiction where the cause of complaint, if any, properly exists and is triable, there will soon be an end of all constraint upon married persons in regard to the proper duties of the relation, beyond that of the most wayward inclination.

16. We do not propose to discuss the propriety of increasing the facilities for divorce. That is a question in regard to which considerable divergency of opinion exists, among religious and thoughtful men, and where something more than mere divergency of opinion exists, between that class of men and certain other classes whose influence upon public opinion is not inconsiderable. We do not desire, therefore, to make any question here upon that point. All we desire is, that the practice of the courts may be preserved from contamination.

17. And we suppose that all parties and professions throughout the country are agreed in maintaining inviolate this great, leading, and fundamental principle of national and international jurisprudence. And if we are right in this belief, we cannot be wrong in supposing that any suggestions in relation to the proper weight of those *ex parte* decrees of divorce, granted in states foreign to those where the causes of such decree accrued, and where the parties were domiciled at the time, will be received and weighed with that caution and consideration befitting the gravity of the subject.

18. We do not care to examine the question of the validity of such decrees in the state where rendered. As we have before intimated, we make no question of the power of the legislature of an independent sovereign state to grant divorces for any cause, or for no cause, in its own discretion. It may do it for adultery alone, according to the law of most Christian countries, or for incompatibility of temper, or what is of the same import, for reasons of state policy, according to the Code Napoleon, and the practice of him whose name it bears. And we do not intend to bring in question the *power* of a sovereign state to allow its courts to grant such divorces to persons domiciled there, for causes accruing in any foreign jurisdiction, and while the parties were domiciled there. The effect of such divorces being only

to allow the party, to marry again, *within that particular forum*, is equivalent to allowing the person the privilege of taking another wife or husband ; and this they might do without reference to the fact of such person already having one wife or husband, whether such other wife or husband resided within or without that jurisdiction. We do not, therefore, question the right of any sovereign state, by legislative acts, to define the terms and conditions upon which any person within that jurisdiction may marry again. And if it is more seemly and less offensive to place the privilege upon the condition of obtaining a decree of divorce, instead of allowing such person to marry, without reference to the fact of having another husband or wife residing in another state, it may unquestionably be done in that form. If a state can at any moment, by a single act of legislation, establish the law of polygamy, according to the theory of Brigham Young, or in its milder form, as it existed in patriarchal days, of which there can be no question, it is idle to criticise the form in which they may choose to grant divorce, with the right to marry again, within the particular jurisdiction. The only question which could arise would be whether it is exactly just, towards the courts in such a state, to require them to participate in such proceedings.

19. But our concern, at present, is with the effect of such decrees in other jurisdictions, and especially in that of the former domicile of the parties. And here we may assume that such decree of divorce, granted in the foreign state upon the domicile of one party only, and that instituted after the happening of all the events or alleged wrongs which constitute the ground of the petition for divorce, and without in any proper manner acquiring jurisdiction of the other party ; we may assume that such a decree will be judged by the ordinary rules applicable to judgments ; that it will not be considered as entitled to any special favor, in regard to the weight it shall command, since it is altogether a volunteer proceeding, one which was sought after by the party in whose favor it is rendered, and not one which was thrown upon him in virtue of his continued residence in the same jurisdiction. Viewed then merely in the light of a judgment, how is it to be maintained ?

(1.) It is not a judgment *in rem*, but strictly *inter partes*. A decree of divorce is as much a proceeding *inter partes* as an action of tort, or contract. There is no subject-matter, upon which the jurisdiction rests, which is transitory in its nature, like a ship or cargo, and which may be transferred with one of the parties, or without either, from one forum to another. It has no such distinct subject-matter, independent of the parties. This will not be claimed by any one as the ground of jurisdiction.

(2.) The jurisdiction in cases of this kind cannot be affected by the consent of the parties, either express or implied, as in ordinary actions of contract, or tort, where the parties may waive any obstacle to jurisdiction. But in regard to divorce, the matter is not exclusively under the control of the parties. The parties cannot dissolve the relation at will, nor can they effect that result by consent to a decree of court, which is but another mode of effecting the dissolution of the relation by consent alone. The fact of connivance between the parties in creating a decree of divorce would be good ground to avoid its effect, by application to the court passing the decree. The court must have jurisdiction of the subject-matter in a cause of divorce, wholly independent of any consent of the parties, and must proceed upon proofs, and not upon the concessions of the parties, in order to render a valid judgment, which shall have the effect to dissolve the relation, beyond the limits of the particular forum. And in addition to this, the court must have the jurisdiction of *both* the parties. This jurisdiction of the parties may be effected, perhaps, by consent, where it is done *bonâ fide* for the purpose of contesting the questions at issue, and not by way of connivance, at a colorable judgment; but to the jurisdiction of the subject-matter of the cause of divorce, it is essential that it should have accrued within that jurisdiction. Without this all proceedings are absolutely void as to both parties. And even with this, it is requisite also, to have the proper jurisdiction of *both the parties*.

(3.) What, then, is the subject-matter in a suit for divorce? It is the act or acts which constitute the cause of action. And these are not transitory, as we have seen, but strictly local. They do not depend upon the contract of marriage, or the law of the state

at the time and place of the solemnization of the contract, but upon the continuing law of the state where the parties are domiciled from time to time. A cause of divorce must be a breach of that law of the state, at the time it occurs. The law of the state, where the parties are domiciled, is the law of the contract for the time, and any good cause of divorce must be a breach of this law. The subject-matter of a suit for divorce can only occur where the parties are domiciled at the time it occurs. And it cannot be transferred to another forum by even the *bonâ fide* change of the domicil of both parties, because it is an offence against the law of the state where it occurs, and is of such a police and disciplinary character, that no state can delegate its execution to any other sovereignty. It is a matter in which the state where it occurs has an important interest altogether independent of the parties, and which that state may remit without the consent of the parties.

(4.) If, for instance, cruelty or desertion is made ground of divorce *a vinculo*, in the place where the parties reside, and such facts occur, and thus a good cause of action accrues, it cannot be enforced after the statute creating the penalty is repealed, without any saving of existing causes of divorce. It is like any other penal consequence. It depends not only upon the existence of the law creating such a penalty at the time the facts occur, but its enforcement depends also upon the continuance of the law at the time of the decree, or judgment. This is familiar law as to ordinary penal actions. And there can be no question of its entire application to the subject of divorce.

(5.) One jurisdiction can no more enforce the divorce laws of another jurisdiction than its probate laws. The proceedings in one forum are wholly independent of all others. And the decrees of one probate jurisdiction, upon matters not within its locality and proper jurisdiction, are wholly inoperative in any other forum. And it is equally so in regard to divorce. The jurisdiction, too, in both cases depends upon domicil, so far as personalty in probate matters is concerned. The validity of wills, and the rules of descent, so far as personalty is concerned, depend upon the domi-

cil of the decedent at the time of the decease ; and the courts of the place of domicil have the exclusive jurisdiction to determine what the law is upon these points, and the decision of any other court, not having the proper jurisdiction on these questions, is of no validity. This has been too often decided, and there is too little question upon the point, to justify the citation of authorities in regard to probate proceedings. And the course of decision is equally uniform in regard to decrees of divorce. The cause of action is entirely local, depending upon the violation of the law of the place of domicil at the time, and can only be enforced in that forum and under that law, the same as any other corrective penal consequence.

20. We may therefore conclude, we think, that when any court attempts to take cognisance of an action for divorce, based upon facts accruing while the parties were domiciled without the forum, they are acting wholly without jurisdiction. Such acts could not be a violation of the laws of any state where the parties were not domiciled. For if they could be so viewed, then they might equally be regarded as a violation of the laws of *all other states*, and there would be no security. An act which, according to the law of the place of domicil, was indifferent, or to which no penal consequences attached at the time of perpetration, if it could be treated as a violation of the laws of all foreign states, or of the contract of marriage, and of its duties and obligations, as construed, measured, or defined by the laws of all other states, might become the instrument of forfeiting the most important and vital interests pertaining to social life. The absurdity of such a construction is too glaring to require illustration. To be consistent, foreign courts, if they assume to take jurisdiction of causes of divorce accruing while the parties were domiciled abroad, ought to judge the matter, according to the law by which the parties were governed at the time of the commission of the acts. This is done in all ordinary transitory causes of action, whether growing out of contract or tort. The transaction is judged by the law of the place where it occurred. Any other course would become intolerable. No court, in any civilized country, would presume to determine the rights of the parties, in relation to torts or breaches of

contract, by a law to which they owed no allegiance, and to which they had no reference, even in intent, at the time the facts occurred. And it would be an equal violation of principle, to apply any different rule to causes of divorce, from what is of universal application to all transitory causes of action, when a cause of divorce is attempted to be determined in another forum.

21. It is the absurdity of attempting to enforce the laws of a foreign jurisdiction, in regard to the rights and duties of married people, which has led some of the American states, who assume to grant divorces on that ground, to attempt to judge such causes by their own laws, a rule to which they had no reference at the time they occurred. It is escaping from one absurd consequence by falling into another, and, if possible, a grosser absurdity. For however unreasonable it may seem, for one state to attempt to enforce the laws of another state in regard to the grounds of granting divorces *a vinculo*, it is certainly not less so, to attempt to grant divorces of that character, in one state, for causes accruing while the parties are domiciled in another, and to do it upon the ground that such causes constituted, at the time of their occurrence, good reason for granting divorce according to the laws of another state, to which the parties were wholly strangers, without regard to the fact whether they afforded any just cause of divorce where they occurred.

22. But there is still an additional reason why the courts cannot grant such divorces upon the mere residence, or domicile, of *one of the parties only*. Courts can acquire no proper jurisdiction for the trial of any cause, affecting correlative parties, without having *both parties*, constructively, within the jurisdiction of the court. Hence, it has often been determined, that a judgment rendered upon the suit of one party, without the presence of the other within the jurisdiction, is a mere nullity, in every other state or country. It does not come within the provision of the United States Constitution and the Act of Congress, giving the judgments and judicial proceedings of one state the same force in every other state which they have in the state where rendered. Such *ex parte* judgments are not what was intended by this constitutional

provision, which it is now fully settled has reference only to judgments rendered between party and party, where there is full jurisdiction of *both parties*. This is now the universally received rule. Some of the states have attempted to maintain the literal construction of that constitutional provision, that *transactions* in the courts of a state are "judicial proceedings," and are therefore entitled to "full faith and credit" in every other state, which, by the Act of Congress and the doctrine of some of the early cases in the United States Supreme Court, is defined to be *the same credit which such acts receive in the state where transacted*. This is the view attempted to be maintained in *Mills vs. Duryee*, 7 Cranch 481; *Hamilton vs. McConnell*, 3 Wheaton 234; *Lapham vs. Briggs*, 27 Vt. R. 26; but it is not the doctrine which has finally prevailed, even in the national tribunals. It is now clearly settled that to entitle a judgment in one state to full faith and credit in another, it must be a complete judgment, in all essential particulars, and above all, there must have been in the court complete jurisdiction, both of *the subject-matter and of both the parties*; and where this latter quality is wanting, the adjudication is wholly inoperative, out of the jurisdiction, whatever may be its weight within that jurisdiction. This was early declared in *Bissell vs. Briggs*, 9 Mass. R. 462; *Hall vs. Williams*, 6 Pick. 246; *Thurber vs. Blackbourne*, 1 N. H. R. 242, 245; *Kilburn vs. Woodworth*, 5 Johns. R. 37; *Holt vs. Alloway*, 2 Blackf. R. 108; and many others in the courts of the different states; *Earthman vs. Jones*, 2 Yerger 484. And the same rule is now fully established in the Supreme Court of the United States: *D'Arcy vs. Ketchum*, 11 How. R. 165; *Webster vs. Reid*, 11 Id. 456.

23. And it will not help the jurisdiction of the courts in one state to bind persons residing in other states, and not served with process within the forum, that notice was given them out of the state, of the pendency of such action in another state. No man is obliged to go into a foreign jurisdiction to contest his rights, or to submit them to the judgment of a foreign judicatory. This has been often so held: *Story, J.*, in *Picquet vs. Swan*, 3 Mason 469; *Flower vs. Parker*, Id. 251; *Fenton vs. Garlick*, 8 Johns. R.

194; *Dunn vs. Dunn*, 4 Paige's R. 425; 2 Fairf. 98; *Lyon vs. Lyon*, 2 Gray 367; *Arnold vs. Tourtelot*, 13 Pick. R. 172.

24. But it may be proper briefly to review the cases which have arisen in the American states upon the very question of the effect of such a judgment rendered in a suit for divorce, in a state where the cause of action did not accrue, and where the parties never lived as husband and wife, and where the defendant in the proceeding never was served with process, or came to reside. It is a question which early came in debate before the courts of Massachusetts and New York, in regard to the effect, we are sorry to confess, of such decrees of divorce rendered in the state of Vermont. This subject is discussed with great learning and ability in *Barber vs. Root*, 10 Mass. 260, and the injustice and unreasonableness of granting divorces in jurisdictions foreign to the domicile of the parties, and without any proper jurisdiction of the subject-matter, and the parties, is here commented upon with great severity by SEWALL, J. The learned judge here says: "Regulations on the subject of marriage and divorce are rather parts of the criminal than of the civil code, and apply not so much to the contract between the parties as to the personal relations resulting from it." * * "The *lex loci*, therefore, by which the conduct of married persons is to be regulated, and their relative duties are to be determined, and by which the relation itself is to be, in certain cases, annulled, must be always referred, not to the place where the contract was entered into, but where it subsists for the time—where the parties have had their domicile, and have been protected in their rights resulting from the marriage contract; and especially where the parties are or have been amenable for any violations of the duties incumbent upon them in that relation."

25. The learned judge adds that such proceedings for causes of action not claimed to have accrued in the state, or while the parties or either of them are domiciled there, or to "have been done in violation of any contract subsisting, or which had ever been recognised there; in short, where no jurisdiction of the parties or of the subject-matter can be suggested or supposed, are

not to be justified by any principles of comity which have been known to prevail in the intercourse of civilized states. I must be permitted to say the operation of this *assumed and extraordinary jurisdiction is an annoyance to the neighboring states, injurious to the minds and happiness of their people; and the exercise of it is, for these reasons, TO BE REPROBATED IN THE STRONGEST TERMS, and to be counteracted by legislative provisions in the offended states.*" This is indeed plain language, but, in our judgment, no more plain than just. And now that the example of Vermont has been copied by numbers of the other states, and among them some of the largest and most reputable, it may have become common to speak of it with more apparent respect, and certainly with less severity; it is nevertheless still an offence and an insult to other states, not to say a reproach to the jurisprudence of the country, that such things should receive so much countenance as they seem to have done in some of the American courts. The very point is also decided against the validity of such a judgment in *Hanover vs. Turner*, 14 Mass. R. 227, 231. The court here say: "If we were to give effect to this decree, we should permit another state to *govern* our citizens in direct contravention of our own statutes, and this can be required by no rule of comity;" and the same is in substance declared in *Lyon vs. Lyon*, 2 Gray's R. 369. SHAW, C. J., here says: "Even before the Revised Statutes, upon general principles of justice and policy, such a decree would not have been held valid but void, partly on the ground that it was a proceeding in fraud of our law, and partly because the court of the foreign state could *have no jurisdiction of the subject-matter, and OF BOTH OF THE PARTIES.*"

26. We are glad to have it in our power to point to many other states, besides Massachusetts, where the same wholesome views have been maintained. In New York, at an early day, in the case of *Borden vs. Fitch*, 15 Johns. R. 121, we find a most elaborate and learned discussion of the principles involved in the granting divorces, and of the grounds upon which the legitimate jurisdiction of the subject-matter and of the parties rests, both by the court and the counsel, among whom were some of the brightest lumina-

ries of the bar of that state in her best days; and the opinion of the learned Chief Justice THOMPSON is creditable to his wisdom and learning, and not less so, to his sense of justice and his Christian feeling. And after reviewing all the cases then known on the subject, he concludes that a judgment in a suit for divorce so prosecuted, (quoting the words of Mr. Justice SEWALL with approbation, and adding), "where there was no process served upon the defendant, *within the jurisdiction of the court rendering the judgment, or he made in some measure personally amenable to such jurisdiction,*" is not within the provisions of the United States Constitution, and is therefore wholly void, beyond the limits of the jurisdiction where rendered, whatever force or validity it may have there.

27. In *Bradshaw vs. Heath*, 13 Wend. Rep. 407, the question and the authorities, both English and American, are examined very much in detail, by SAVAGE, C. J., in regard to divorce granted by the Superior Court of Connecticut, upon the petition of the wife, the husband residing in New York, and not appearing, on being served with process in Connecticut; and the transactions having accrued while the parties were domiciled in New York. The learned judge here quotes with approbation the language of THOMPSON, C. J., in *Borden vs. Fitch*, *supra*, "that to sanction such a divorce was contrary to the first principles of justice; that a judgment could have no validity unless the court had jurisdiction both of the person and of the subject-matter, and want of such jurisdiction rendered it void and unavailable for any purpose." In *Vischer vs. Vischer*, 12 Barb. 640, the question and the authorities are again reviewed at length by Mr. Justice HAND, and the conclusion reached, that where the court have no proper jurisdiction of *both* the parties, the defendant not appearing, and having no notice except by publication, under the order of the foreign court, which a non-resident party is not bound to regard, whether he have knowledge of such publication or not, is of no avail whatever, but is absolutely void. It is here hinted that if the parties both appear in the suit, that *may* give jurisdiction; but it is evident that must depend upon the nature of the cause

of action, whether it be local, or transitory, in its nature. The subject is again considered in *McGiffert vs. McGiffert*, 31 Barb. Rep. 69, where it was decided that where a man, being a resident of New York, and having a wife residing there, goes to another state, and in a suit brought there, obtains a decree of divorce against his wife, without any service of process on, or notice to her, or any appearance by her, such decree is void and unavailing for any purpose whatever.

28. The same view has been taken of the subject in Kentucky, in *Maguire vs. Maguire*, 7 Dana 181, of which case Chancellor KENT, 2 Com. 117, 118, in note, says, "It is held that no state or nation has power to dissolve the marriage contract between citizens of any other state or nation, not resident or domiciled within its limits, for no nation could preserve its social order, if any other foreign state could, without its consent, dissolve or disturb that most important domestic institution of marriage." This principle was here clearly and learnedly illustrated by Chief Justice ROBERTSON, and the decree held void. This same principle has been maintained in many other of the American states.

29. We believe this proposition has been maintained in nearly all the states of this country where the question has arisen, and been thoroughly considered. There are some of the American states where laws upon the subject of granting divorces for causes accruing out of their jurisdiction, have been an occasion of reproach and scandal to their neighbors, in consequence of the facility with which such divorces were obtained there, and which may properly, therefore, be regarded as "infected states," where these *ex parte* divorces have been attempted to be vindicated, to some extent, as not being wholly void. But it seems to us the effort has not proved a successful one.

30. In *Harding vs. Alden*, 9 Greenl. R. 140, where the question is discussed at considerable length by WESTON, J., a distinction is attempted to be made between that portion of the decree granting alimony, which, as a money obligation, attempted to be imposed upon the defendant not within the jurisdiction of the court, was confessedly void, and the other portion of the judgment which assumed

to dissolve the marriage. But this distinction is wholly denied in *Jackson vs. Jackson*, 1 Johns. R. 432, where the suit was for the alimony, and the judgment was rendered upon the appearance of both parties. The entire decree was in that case held void for want of jurisdiction of the *subject-matter*. And it would seem most absurd to deny its validity upon the mere incident of alimony, while attempting to maintain it upon the principal cause of action. As to the pecuniary obligation resulting from the judgment, the question is no doubt clear and plain, where the defendant does not appear and is not served with process within the jurisdiction. The decisions are all one way. And it is equally clear, upon general principles, that the entire judgment is a nullity. It is more a nullity than in the ordinary case of transitory causes of action, of which the foreign court may, by a fiction, be presumed to have cognisance, in some sense, when suit is brought upon it by one of the parties. But in regard to causes of divorce, *which are strictly local* in their nature, there is no pretence that any court, beyond the limits of the forum where the cause of action accrues, could have jurisdiction, even by the consent of both parties. An indictment for crime might just as well be tried in a foreign jurisdiction, upon the prosecution of the attorney-general, by the consent of the respondent. And the court here assign no reason for holding the divorce valid, except the inconvenience which would result from not sustaining it, and that the objection "would apply with equal force to many divorces decreed in this state." As if it was any reason why a judgment should be held valid because similar judgments had been rendered by the court where the question was tried; the result of which would be, that if the court had been induced, by the petition of an interested party, and without notice to or appearance of the other party, to render a void judgment, by default, and wholly *ex parte*, they were bound to uphold the same, on solemn argument, and even to extend the same rule to judgments rendered in other states, lest they might incidentally impeach their own proceedings.

This seems to be acknowledging a degree of infirmity, of which some men, and some judges, perhaps, may be guilty, but which it

is not common to acknowledge so frankly. The truth is, that such an argument would lead to the perpetuity of all errors in jurisprudence, however accidentally adopted in the first instance.

31. But there is one case, *Ditson vs. Ditson*, 4 Rhode Is. R. 89, where this rule of the validity of *ex parte* divorces in foreign states is attempted to be vindicated upon general principles. It is here declared that jurisdiction of *the cause* is acquired by the domicile of *one of the parties*, and that the petitioner being within the state is sufficient to give jurisdiction of the cause, notwithstanding the cause of action accrued without the state, and that this is so upon *general principles*, upon the ground that it pertains to all sovereign states to declare conclusively the *status* of their own citizens. The argument of the learned judge in this case is drawn up with great coolness and deliberation, and comes with great weight, both from its intrinsic force and the high reputation of its author as a learned jurist and a most exemplary and faithful magistrate; and we always regret exceedingly the necessity to dissent from the opinion of such a judge. But there seems here no alternative. The learned judge concedes fully that the opinion of Chief Justice SHAW, in *Lyon vs. Lyon*, 2 Gray 367, is against the view for which he contends, and that it is distinctly put by this able and experienced magistrate, upon the broad ground that such decrees of divorce are in all cases "VOID, UPON GENERAL PRINCIPLES OF LAW." This is, indeed, to acknowledge, in the outset, a great weight of authority against the proposition attempted to be maintained. Any legal proposition condemned in such unequivocal terms by such an authority as Chief Justice SHAW, must needs present very good reasons for its adoption, or it will be likely to meet with slight encouragement.

32. The suggestion that Chief Justice SHAW had fallen into an inaccuracy of expression, when he speaks of the *subject-matter* of divorce as confined to the domicile of the parties at the time the cause accrued, and quoting Mr. Justice STORY, *Confl. Laws*, § 230, *a*, in confirmation of that inaccuracy, is certainly a misconception of the real meaning of the authority quoted. There is no conflict between the views of these two eminent jurists, as we construe

them. Mr. Justice STORY does not here intend to affirm that the subject-matter of the cause of action is not confined to the domicile of the parties at the time it accrues. The first authority cited by Mr. Justice STORY, *Pawling vs. Bird's Ex'rs.*, 13 Johns. R. 192, goes clearly to show that this is not what is intended by the learned author. And what is said in regard to it being unimportant, that the cause of divorce accrued where the parties were not domiciled, has reference, unquestionably, to the domicile at the time the cause of action accrued, it being clearly settled that all such acts, wherever they occur, are referred to the domicile of the parties at the time. It is evident the writer did not refer to cases of change of domicile after the cause of action accrued, and the cases cited in the note to that effect were probably added by others, since the decease of the learned author, as bearing upon the general question. For the very section referred to quotes with approbation the opinion of Chief Justice GIBSON, in *Dorsey vs. Dorsey*, 7 Watts 349, and in the very portion extracted by the learned author it is said: "Transfer of allegiance and domicile is a contingency which enters into the views of the parties, and of which the wife consents to bear the risk. By sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it, *but with the limitation, we part not with the remedy of past transgression,*"—which excepts the very point for which the section is quoted against the words of Chief Justice SHAW, and which shows very clearly that both Mr. Justice STORY and Chief Justice GIBSON coincide with Chief Justice SHAW upon this point. This is also the view expressed by Chief Justice ROBERTSON, in *Maguire vs. Maguire*, 7 Dana 181, and by all the American courts, so far as we know, with the exception of the two cases already named in Maine and Rhode Island, and that of *Tolen vs. Tolen*, 2 Blackf. (Ind.) R. 407. And these decisions have all come from states which have acquired an unenviable notoriety in regard to their lax views upon the laws of divorce. We say this more in sorrow than in anger, but chiefly as a needful caution against the weight of the decisions in these states upon this subject.

33. It is unnecessary to pursue this discussion further. The right of every state to dissolve the marriage relation of all its domiciled inhabitants, for causes accruing while such domicile continues, no one will question. And the constitutional right to dissolve that relation between two parties domiciled there, even for causes accruing while they had their domicile in another state, it is not needful to discuss. Other states would not, and have no just right to, complain of that, even. And as they may confessedly allow their domiciled inhabitants to marry again, without reference to having another wife or husband in another state, it is not worth while to make much controversy about the mode of doing it.

But other states have the right to complain, and they will complain, if they have any proper sense of the important consequences which flow from giving countenance to the unrestricted disregard of the marriage relation, when one state assumes to dissolve the marriage tie between man and wife, when neither the solemnization of the contract, the alleged breach of its duties, or the domicile of the offending party, even, come within the state; and where there is no service of process upon such party within the state. There is no possible apology for such a proceeding, and it cannot obtain respect beyond the limits of the forum where it is done. We have already referred to cases in Massachusetts, New York, Pennsylvania, Kentucky, and Tennessee, condemning such a practice. Similar views are maintained in *Hull vs. Hull*, 2 Strobb. Eq. 174; *Edwards vs. Green*, 9 Louisiana. 317; *Irby vs. Wilson*, 1 Dev. & Batt. Eq. R. 568, 576; and doubtless many others; while the more relaxed rule gains no countenance by the formal decisions of more than three of the states.

The ground maintained in *Ditson vs. Ditson*, *supra*, that jurisdiction is acquired over the subject-matter by the domicile of one of the parties, because it is a matter affecting the *status* of that party, seems to us to have no just application to the subject. The *status* of the person has no more just application to the relation of husband and wife, than to that of debtor and creditor, parent and child, guardian and ward, and numerous similar correlative

relations. And it will not be claimed that the *status* of domiciled inhabitants, in these respects, can be so fixed by the decrees of one state as to affect the correlative rights of the other party, who never came within the jurisdiction of that state, and where the transaction in question occurred wholly in other jurisdictions. This has been long settled in regard to discharges in insolvency, and there can be no question the same rule would be extended to the other relations named.

And there would be as little doubt in regard to the relation of marriage, were it not that the forming of a new relation of that kind with a third party is supposed to present embarrassing questions in regard to crime, or legitimacy. But all this results from an attempt to maintain inviolate the doctrine of one marriage only, or monogamy, as it is called.

34. If we were only reconciled to meet the subject fairly, and to call things by their right names, instead of attempting to *bend* the old doctrines of the common law, and to introduce doctrines never attempted to be maintained in any other country, where polygamy is not sanctioned, there would be no embarrassment. Let us then hereafter meet the question fairly, and avow the clear and obvious consequence of such a doctrine, that such an *ex parte* decree of divorce has no proper effect upon the *relation* of husband and wife; that the married relation remains the same as it was before; the petitioner is still married to the absent defendant, who never became a party to the proceeding or the judgment, and who is, of course, in no way affected by it, and consequently the *married relation* remains the same as before, and all its rights and duties, beyond the limits of the state, are the same. But the decree has nevertheless produced some very important results upon the *status* of the petitioner. The petitioner is released, within that particular state, from all his duties and obligations connected with the former marriage, and the contract is annulled as to him, *within the state*, and he or she is at liberty to take another wife or husband, *within that forum*, and there to exercise the correlative rights and duties growing out of the new relation, and is absolved from all penal or other consequences, on account of the existence of another wife or husband, in another state.

35. This will not, indeed, legalize polygamy precisely in the state where such decrees in regard to the *status* of its domiciled inhabitants are passed. It only allows a man to have a *different* wife in *different* states! And this rule is susceptible of such extension that the same man *may* have many *different wives* in different states, but only *one* wife in the *same* state. And if there be any soundness in the maxim that exchange is no robbery, we do not exactly perceive how such a person is liable to punishment under the statute against bigamy, since he has not *two* wives with reference to any *one* jurisdiction, but only *different* wives in *different* jurisdictions.

36. We trust we shall not be accused of any improper degree of levity in regard to the right of one state to determine the *status* of a married person with reference to transactions occurring while the parties were domiciled in another state, where the domicile of the other party still remains, and without having acquired any proper jurisdiction of such party. The proposition of giving jurisdiction of the transaction in such a manner is too one-sided, and too glaringly absurd, not to say offensive, to be seriously entertained by any mind not some way perverted upon the point in controversy. For while the party, leaving the former domicile of both the parties, is obtaining a divorce upon his own *ex parte* petition, and upon what the foreign state consents to call a new domicile, and without bringing the other party or the subject-matter of the contest within the new jurisdiction; at the very moment while this *ex parte* proceeding is giving a new *status* to *one party*, the other party, in the place of the old domicile, upon a petition for alimony, or separate maintenance, or for restitution of conjugal rights, is obtaining a decree *confirming the former status*. How, then, shall these two *status* be reconciled, and which shall prevail? This mode of illustration might be carried further, but enough has been said to show that the claim is based upon the broad principle of the right of one state to allow its domiciled inhabitants to marry again, without reference to any impediment of having another husband, or wife, in another state. The claim of the right to fix the *status* of its inhabitants in this respect means all this, or else it means nothing.

37. The opinion of Chief Justice RUFFIN, in *Irby vs. Wilson*, 1 Dev. & Batt. 568, is so pertinent to many of the propositions maintained in this paper, that we cannot forbear quoting it. This was a case where the parties married in South Carolina, and removed to Tennessee, where the parties were domiciled; and living unhappy, the wife returned to her relations in North Carolina. Six years after she left the state, the husband instituted proceedings and obtained a divorce, the validity of which here came under consideration. There was no service of process upon the wife, and she did not appear. The learned judge said: "The decree of the court of Tennessee was altogether inoperative and null; it was not an adjudication between any parties." "One state cannot send process into another." "The Constitution of the United States, in providing that full faith and credit shall be given to the judicial proceedings of one state in the courts of another, intended only to render the record of a suit *inter partes* conclusive; not to enable a state to assume jurisdiction of persons without her boundaries, and dispense with the service of process." "It was intended to restrain one state from disregarding the judicial sentences rendered in another *between parties* or *on things* within it." "There can be no valid adjudication unless there *be a thing or persons before the court*. Without that, what purports to be an adjudication is a perfect nullity, and binds one person no more than it does another." "One being named in the proceedings, and not served with process within the state, is the same as if he were not named."

38. We had intended to say something upon the right of the parties to change domicil during the coverture. The husband may always, so long as the parties live together, change the joint domicil at pleasure. But after a separation, and the parties are in conflict, he cannot transfer the domicil of the wife. She retains the joint domicil as it was at the time of the separation, and may there maintain any proper suit for the redress of her rights; and the departure of the husband from that jurisdiction, and the acquiring of another domicil, which he may unquestionably do, will not defeat the jurisdiction of the courts of the place of the joint domicil before the separation, as to any matters occurring

while the parties were so domiciled: *Harteau vs. Harteau*, 14 Pick. R. 181, 186, where the question is thoroughly and learnedly discussed by SHAW, C. J. The right of the wife to acquire a new domicile, even after the abandonment of her husband, and before a judicial separation, seems questionable. It has sometimes been so decided; but the better opinion is that she cannot, unless it be by way of a return to the place of her ante-nuptial domicile, or that of the place of the marriage, or to some place where the parties have before lived together as husband and wife: *Harteau vs. Harteau*, *supra*; SPENCER, J., in *Jackson vs. Jackson*, 1 Johns. R. 432; *Dolphin vs. Robins*, 5 Jur. N. S. 1271, where the question is thoroughly discussed by the House of Lords in 1859. And the same question is again considered in *Yelverton vs. Yelverton*, 6 Jur. N. S. 24, where it was said by Sir CRESSWELL CRESSWELL: "The domicile of the husband is the domicile of the wife, and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not, on that ground, acquire a new domicile for herself." But it is clear, the husband, after such misconduct and a separation, cannot drag the wife's domicile after him, whither he chooses to go. See also *Daley, in re*, 25 Beavan 456; *Irby vs. Wilson*, 1 Dev. & Batt. 568, 582. I. F. R.

NOTE.—We have received from Mr. Bishop, the author of the valuable treatise upon Marriage and Divorce, a moderate and dignified remonstrance against the statement in our leading article in the January number of this Magazine, to the effect that he had "misstated the law of Maryland," in regard to the validity of a marriage in that state without the intervention of a minister or duly authorized official. So far as the statement had any appearance of disrespect to Mr. Bishop, we heartily regret it, but we must be allowed to disclaim entirely any responsibility for the accuracy of the law as stated in the article in question. We gave it for its general interest and its manifest learning upon the neglected branch of early colonial law. In so general a view, it is scarcely to be expected that some mistakes should not occur in the statement of the actual law of the various states—indeed the position assumed, that some particular form of words, or the intervention of a minister or official of some kind, is necessary to the validity of a marriage, is very questionable, and as to the law of Pennsylvania, for one state, undoubtedly incorrect. In addition to this, we have been shown the case to which Mr. Bishop refers as authority for his statement, and we feel compelled to say that it seems to us to warrant the statement in his text.—Eds. AM. L. R.